Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	**CC DOCKET NO. 95-94**
	)	
UACC Midwest, Inc. d/b/a United Artists Cable Mississippi Gulf Coast;	)	
	)	
Telecable Associates, Incorporated;	)	
	)	
Vicksburg Video;	)	**PA 91-0005 through**
	)	**PA 91-0009**
Mississippi Cablevision, Inc.; and	)	
	)	
Mississippi Cable Television Association,	)	
	)	
Complainants	)	
	)	
v.	)	
	)	
South Central Bell Telephone Company,	)	
	)	
Respondent	)	
	)	

TO: Hon. Joseph Chachkin
Administrative Law Judge

OPPOSITION TO MOTION TO ENLARGE ISSUES

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SUMMARY

The Pole Attachment Act and its procedures arose from a long history of telephone company efforts to capture or frustrate the development of cable television as a national communication network. Pole rate overcharges were some of many devices used to stymie cable,

and existing remedies proved insufficient to arrest utility abuses. Congress directed the FCC to adopt "simple and expeditious" procedures for remedying pole abuses, free of the usual complexities of Title II regulation.

In keeping with those directives, pole attachment proceedings are carefully limited to prevent a proliferation of issues and procedures. In this case, Bell South is asking to reopen issues which have been well settled against it. Any remaining objection to that resolution should be presented in an application for review to the Commission, not in a new hearing. Bell South is also asking for an opportunity to raise issues which have been resolved against it or which have been waived in prior process. Ample pole attachment and other authority prevents Bell South from adjusting its position in hindsight or from complicating an otherwise straightforward and carefully limited Hearing Designation Order.

ARGUMENT

Bell South's Motion to Enlarge Issues is divorced from the history and purpose of pole attachment regulations and procedures.

I. The Issues Have Been Carefully Limited In Accordance with Congressional Instruction

A. Congress Directed the FCC to Follow "Simple and Expeditious" Procedures to Resolve Sensitive Pole Attachment Questions

The Pole Act was the direct result of overwhelming evidence of utility overreaching to capture or frustrate the development of cable television as the national

communications network. The communications space on utility poles is pure surplus to the utility; cable never consumes or preempts pole space needed for utility purposes.[1] Moreover, the utilities conceded that pole attachment fees are "added income, and it must be understood it is added income that inures to the benefit of consumers . . . because it offsets operating expenses. . ."[2]

Amos Hostetter, Chairman and Chief Executive Officer of Continental, testified before Congress regarding this problem. One would expect, he testified, that utilities would encourage cable operators to rent pole space. But in practice, the telephone companies did just the opposite, in "a striking parallel to the changes in the telephone company's perception of cable as a competitive force and to the frustration of its efforts to directly enter the cable television business."[3]

When, during the 1950s, cable was viewed as a service inherently limited to small rural communities in mountainous areas, telephone companies permitted attachments at

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[1] Communications Act Amendments of 1977, Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. (1977) (hereinafter "1977 S. Comm.").

[2] Id. at 181.

[3] Id. at 30. Mr. Hostetter testified, further, that:

> I am in search of a forum. If [FCC] Chairman Wiley can direct me to a State forum which works and protects me from the monopolistic extortion that this industry has faced, that would be fine. However, I have tried that route. I have also tried the route of private negotiations. I have been a member of three different committees over a period of 6 years, attempting to reach a settlement with A.T.&T. and G.T.&E. Trying to negotiate with your friendly neighborhood utility has not proved very productive.

1977 S. Comm. 27.

approximately $1.50 per pole.[4] As telephone carriers became aware, from 1955 to 1965, that CATV would develop in urban markets, the Bell system and the major independents (General Telephone and United Telecommunications) each changed their practice. Bell refused attachments and proposed to cable operators that it construct an entire distribution plant for leased channel service.[5] General Telephone & United Telecommunications refused attachments and, not being bound by the 1956 Bell consent decree, created CATV subsidiaries, which thereafter enjoyed great success in obtaining franchises where General and United operated telephone companies.[6] In pole attachment agreements and channel lease tariffs the telephone companies inserted prohibitions on services that CATV could offer, such as pay TV.[7] Additional evidence, detailed during extensive hearings in 1976 and 1977.[8] showed:

- Efforts by the Bell System to force the migration of cable operators onto cables owned by the telephone company, on which they forbade any data transmission and delays imposed on operators who sought to provide independently-owned cable until a more compliant "lease-back" operator could be installed on the poles.[9]

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[4] Id. at 36.

[5] Id.

[6] Id.

[7] Id.

[8] Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the Comm. on Interstate & Foreign Commerce, Parts 1 & 2, 94th Cong., 2d Sess. (1976) (hereinafter "1976 Oversight"); Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce, 94th Cong., 2d Sess. (1976) (hereinafter "1976 H. Comm."); 1977 S. Comm.

[9] 1977 S. Comm. at 30; Better T.V., 31 F.C.C.2d at 966-67 (independent operator "quickly took the hint about the lack of manpower to perform makeready work and accepted channel service rather than run the risk of having the competing channel service customer get such a head start as to make a grant of its request for

- Petty rejections of application forms, the refusal to provide pole or conduit maps to cable operators and interminable delays in processing applications or performing makeready.[10]

- Prohibitions in telco pole attachment agreements and channel lease tariffs on services that cable television could offer, such as pay TV, ETV, CCTV, FM music and two-way services.[11]

- In virtually every case designated for adjudication, the Commission found that the telephone company had abused its monopoly control over poles to gain control over cable television distribution cable.[12] Federal courts reached a similar conclusion.[13]

In 1966 the Commission concluded that "by reason of its control over utility poles . . . the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition.[14] Eventually, in Docket 18509 (a proceeding initiated by the Commission on its own motion in response 17 LEC

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a pole attachment agreement an empty and worthless gesture.")

[10] Section 214 Certificates, 21 F.C.C.2d 307, 316, modified, 22 F.C.C.2d 746 (1970), aff'd, 449 F.2d 846 (5th Cir. 1971).

[11] Id.; Plaintiff's First Statement of Contentions & Proof at 207, United States v. AT&T, Civ. No. 74-1698 (D.D.C. 1978), Attachment 3. General Telephone & United Telecommunications also refused attachments for independent cable operators and, not being bound by the 1956 Bell consent decree, created cable television subsidiaries, which thereafter enjoyed great success in obtaining franchises where General and United operated telephone companies. United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956); 1977 S. Comm. at 37.

[12] 1977 S. Comm. at 37.

[13] TV Signal Co. of Aberdeen v. AT&T, 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D., Mar. 13, 1981).

[14] General Tel. Co. of Cal., 13 F.C.C.2d 488, 463, recon denied, 14 F.C.C.2d 693 (1968), aff'd, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969).

Section 214 channel leasing applications), the Commission found that there was "ample basis" for regarding CATV service not just as an entertainment service but as a gateway to the developing market for broadband communications services.[1516]

In an effort to protect this "gateway" for broadband services, the FCC adopted the telco/cable crossownership rules, and required utilities to offer "leaseback" applicants independent pole attachment rights free of such use restraints.[17] The rules were intended to "preserv[e]. . . a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communication media."[18]

Stymied in the use of affiliated subsidiaries and channel lease agreements, telephone carriers almost immediately demanded, through the direction of their corporate headquarters, vastly increased cable pole rates,[19] a powerful weapon frequently employed by telephone companies today. As explained in an AT&T memo, the prices were set not on Bell's cost but to discourage independent attachments and encourage lease of channels controlled by Bell.[20]

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[15] Section 214 Certificates, 21 F.C.C.2d 307 (1970).

[16] Id. at 324.

[17] Id. at 325-27.

[18] Id. at 325.

[19] S. Comm. at 38.

[20] The memo states:

> Apparently, the incremental cost to the Bell System is expected to average about $1 per pole attachment. The cost to a CATV company to provide its own plant and equipment, which will be of a lower quality would average between $4 and $5 per pole attachment, with high probability of added maintenance costs.

Although remedies were possible in antitrust litigation,[21] Congress intended to provide a more straightforward solution through the Pole Act. The FCC was directed to adopt a "simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." S. Rep. 95-580, 95th Cong., 1st Sess. 21 (1977). The Commission has specifically drafted its pole attachment procedures so that "typically we would expect that these complaints can be resolved on the basis of the filings," with evidentiary hearings reserved for "very exceptional cases where other simpler procedures would not be appropriated." Notice of Proposed Rulemaking in CC Docket 78-144, 68 F.C.C.2d 3, 7 (1978); First Report and Order in CC 78-144, 68 F.C.C.2d 1585, 1600 (1978). These "simple and expeditious" procedures for regulating pole rents were to eschew the complexities of formal common carrier complaint procedures. The FCC has done so, through rulemaking which established the basic contours of rate regulation on poles, and which has been refined through more than 100 cases. This flexibility of approach, has allowed the Commission to efficiently remedy pole abuses while remaining flexible in individual cases to account for unusual facts.

> According to economic theory, Bell should charge a fee very close to the $4 level. If these CATV companies can save even 10 cents per attachment by buying them from Bell it would add that amount to their profits.
>
> Charging a few cents below the $4 level, however, is cutting it rather close, so it is probably better strategy to charge a fee somewhere in the middle ground between $1 and $4.

Attachment 3 (United States v. AT&T, No. 74-1698, Plaintiff's First Statement of Contentions and Proof at 209-210 (quoting AT&T memo)).

[21] TV Signal Co. of Aberdeen v. AT&T, 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D., Mar. 13, 1981).

B. FCC Pole Procedures Do Not Provide for Expanding Hearing Issues as Requested by Bell South

1. Cases Are Generally to be Resolved On the Pleadings

It is the obligation of the parties, however, to present those facts in a brief cycle of three pleadings. For most of the life of pole regulation, the typical cycle has been for a cable operator to file a complaint; the utility to file a response; and the cable operator to file a reply. Factual materials are established by affidavit, rather than by evidentiary hearing. 47 C.F.R. §§ 1.1407, 1.1409. Until this year, the Bureau would not only resolve the computational issues but would calculate the rate. It would then direct the parties to apply the new rate to prior payments, and order the utility to refund the difference with interest.

2. The Hearing Designation Process Has Been Carefully Limited to Accord With Pole Attachment Practice

This year, the procedures have changed slightly, but by no means fundamentally. The Bureau, as is customary, resolved virtually all of the policy and accounting issues, but determined in this case that there were remaining factual issues which could most effectively be developed under the supervision of an ALJ. It also placed the refund calculations with the same judge. Yet it encouraged the judge to promote informal settlements and factual resolutions without the need for evidentiary hearings, as has been the past practice with pole attachments. In addition, it preserved the appeal path from past practice. Instead of having the judge's decisions appealed to the Review Board, the Commission directed such appeals to the Commission, so that the substantive issues resolved in the Bureau HDO, and the factual decisions in the ALJ's decision, could be routed on a consolidated basis to the full Commission.

II. Bell South's Request Is Procedurally Defective

Bell South now asks for this hearing to be enlarged to encompass two sets of issues: a relitigation of issues resolved by the Bureau (computation of the maintenance charge) and to permit Bell South to take positions which it did not take before (such as conducting a useable space study which it elected not to submit before.)

A. The Exclusion of Electric Pole Rents from Telephone Pole Maintenance Calculations Should Not Be Reopened in Hearing

The Bureau quite rightly decided the maintenance issue against Bell South. What Bell South sought to do was to charge as part of its "maintenance" expenses the pole rents which it pays to power companies. In any given area in Mississippi, some pole routes are owned not by Respondent, but by electric utilities, such as Mississippi Power & Light, Mississippi Power Co., or coops. Complainants rent space on these poles and pay rent to the power companies for that space. Respondent does the same thing, renting space on the power poles, for attachments usually one foot below cable television, and paying the power company for that space. For example, from the record, of the $7,601,487 booked in A/C 6411 for the first year of this dispute, $6,532,065 is for these rents paid by Bell South to power companies for poles not owned by Bell South or leased by Bell South to Complainants. These rents paid by Bell South are not expenses incurred for the poles to which Complainants make attachments, although the denominator to which Bell South allocates the expenses are. There is no justification for charging Complainants for costs incurred by Bell South for which Complainants receive no service or benefit from Bell South, and for which Complainants independently pay the power companies.

The unfairness of forcing cable to pay twice for power poles was explained to the

Commission in correspondence leading to the publication of its Part 31 to Part 32 table contained in the record. Expert staffers from the Enforcement Division of the Common Carrier Bureau (who had handled poles since 1978) and expert staffers from Accounting & Audits worked for six months on formulating the conversion table. No party challenged it after publication in FCC Record. It was apparent from Bell South's affidavit to the Bureau and from Respondent's course of conduct that Bell South never even reviewed the FCC decision before formulating the rates which gave rise to this complaint. After the complaint was filed, and the A&A letter was reviewed by Bell South's rate department, it revised the Mississippi rates the next year to eliminate the maintenance surcharge. Given this record and course of conduct, there is no reason to reopen the issue before the ALJ.

B. This Hearing Does Not Provide An Opportunity to Relitigate the Issues Resolved By the Bureau or Waived by Bell South

Nor may a party have a second bite on any issue it chooses. Bell South asks that it be provided an opportunity to litigate issues it elected not to litigate before the Bureau, such as conducting a useable space study which it elected not to submit before. On its face, Bell South's Petition is "nothing more than a grossly dilatory attempt" to correct what it now, with the benefit of hindsight, apparently considers to have been an error in its litigation strategy. See Payne of Virginia, Inc., 66 F.C.C.2d 633, 638 (1977); Guinan v. FCC, 297 F.2d 782, 787 (D.C. Cir. 1961). Hindsight is not among the changed circumstances justifying consideration of new facts after the Commission has made a decision. Id.

The Commission has consistently stated that it will not sacrifice the substantial public interest in administrative finality by entertaining petitions for reconsideration which are

submitted only to remedy a party's lack of diligence in presenting its case to the Commission. See e.g., Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, 79 F.C.C.2d 232 (1980); Payne of Virginia, Inc., 66 F.C.C.2d at 637; New South Communications, Inc., 58 F.C.C.2d 771, 772 (1976); Nick J. Chaconas, 35 F.C.C.2d 698, 700 (1972), aff'd without opinion sub nom.; Chaconas v. FCC, 486 F.2d 1314 (D.C. Cir. 1973); Cerracche Television Corp., 30 F.C.C.2d 866, 1971); Central Coast Television (KCOY-TV), 3 F.C.C.2d 524, 525 (1966). As the Commission has stated: "The purposes of administrative finality are not served by entertaining petitions for reconsideration ... submitted only to correct oversights in the presentation of a particular case. ... [E]vidence which was easily discoverable initially and apparently only now deemed crucial by [Petitioner] when seen from the 'highland of hindsight' ... can not ... justify a reopening of the record or to overbear the need for administrative finality." Nick J. Chaconas, 35 F.C.C.2d at 700-701. In so holding, the Commission has relied upon the judgement expressed by the District of Columbia Circuit in Colorado Radio Corp. v. FCC, 118 F.2d 24 (1941):

> We cannot allow [petitioner] to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed. [118 F.2d at 26.]

By analogy, the Commission has repeatedly rejected petitions for reconsideration which are based upon a new approach or method of computation. The due diligence required to support a petition for reconsideration under Section 1.106(c) of the Rules "is not demonstrated", the Commission has stated, "by resting one's case upon a single method of computation, and then, when confronted with an adverse decision, employing another method of

computation which could as easily have been used at an earlier time." Louis Adelman, 29 F.C.C. 1223, 1224 (1960), aff'd dub nom. Guinan v. FCC, 297 F.2d 782 (D.C. Cir. 1961). Accord, Cerracche Television Corp., 30 F.C.C.2d at 866 (reconsideration is not warranted where new engineering data is offered merely to approach a question addressed in the initial pleading from a different angle, and could have been included initially): Central Coast Television (KCOY-TV), 3 F.C.C.2d at 525 ("Now that the Commission's determination has been adverse to [petitioner], it proposed to try a different approach and to rely on a new engineering showing. This it cannot do.") Such belated presentations of approach or methodology are treated as being no more worthy of consideration than untimely submission of additional data or other evidence.

CONCLUSION

The Motion to Enlarge has no place in pole attachment proceedings, and should be denied.

Respectfully submitted,
UACC Midwest, Inc. d/b/a United Artists
Cable Mississippi Gulf Coast
Telecable Associates, Incorporated
Vicksburg Video
Mississippi Cablevision, Inc.
Mississippi Cable Television Association

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July 31, 1995

CERTIFICATE OF SERVICE

I, Marlene E. Presley, a legal assistant with the law firm of Cole, Raywid & Braverman, do hereby certify that a copy of the foregoing was sent via first-class, postage pre-paid, United States mail, this 31st day of July, 1995, to the following:

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